Supreme Court, U.S.
FILED
NOV 16 1992
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No. 92-184

In the Supreme Court of the United States

OCTOBER TERM, 1992

PAUL E. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred, in petitioner's trial for conspiracy to distribute cocaine, by admitting evidence of his participation in a prior conspiracy to distribute marijuana.

2. Whether the district court erred in applying the preponderance-of-the-evidence standard when it found that petitioner was an organizer or leader of a criminal activity for purposes of Sentencing Guidelines § 3B1.1.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Huddleston v. *United States*, 485 U.S. 681 (1988)	7
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986)	10, 11, 13
Mullaney v. *Wilbur*, 421 U.S. 684 (1975)	11
United States v. *Beechum*, 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979)	9
United States v. *Cross*, 916 F.2d 622 (11th Cir. 1990), cert. denied, 111 S. Ct. 1331 (1991)	11
United States v. *Gooden*, 892 F.2d 725 (8th Cir. 1989), cert. denied, 496 U.S. 908 (1990)	11
United States v. *Guerra*, 888 F.2d 247 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990)	11
United States v. *Harris*, 932 F.2d 1529 (5th Cir.), cert. denied, 112 S. Ct. 170 (1991)	8
United States v. *Jones*:	
438 F.2d 461 (7th Cir. 1971)	5
933 F.2d 1541 (11th Cir. 1991)	8
United States v. *Manafzadeh*, 592 F.2d 81 (2d Cir. 1979)	9
United States v. *Manner*, 887 F.2d 317 (D.C. Cir. 1989), cert. denied, 493 U.S. 1062 (1990)	9
United States v. *McDowell*, 888 F.2d 285 (3d Cir. 1989)	11
United States v. *O'Connor*, 580 F.2d 38 (2d Cir. 1978)	9
United States v. *Paulino*, 935 F.2d 739 (6th Cir. 1991), cert. denied, 112 S. Ct. 883 (1992)	8

Cases—Continued: Page

United States v. *Penson*, 896 F.2d 1087 (7th Cir. 1990).... 8
United States v. *Restrepo*, 946 F.2d 654 (9th Cir. 1991), cert. denied, 112 S. Ct. 1564 (1992) 11
United States v. *Ring*, 513 F.2d 1001 (6th Cir. 1975)..... 9
United States v. *Salmon*, 948 F.2d 776 (D. C. Cir. 1991).. 11
United States v. *Saucedo*, 950 F.2d 1508 (10th Cir. 1991) 11
United States v. *Silverman*, 889 F.2d 1531 (6th Cir. 1989) 11
United States v. *Sklar*, 920 F.2d 107 (1st Cir. 1990) 11
United States v. *Urrego-Linares*, 879 F.2d 1234 (4th Cir.), cert. denied, 493 U.S. 943 (1989) 11
United States v. *White*, 888 F.2d 490 (7th Cir. 1989) 11

Regulations and rules:

21 U.S.C. 841 (1988 & Supp. III 1991) 12
21 U.S.C. 846 12
21 U.S.C. 848(c) 12
Fed. R. Evid. 404(b) 5, 7
Sentencing Guidelines § 3B1.1 ..... 6, 11, 12, 13

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 956 F.2d 1388.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1992. A petition for rehearing was denied on April 24, 1992 (Pet. App. 45a-46a). The petition for a writ of certiorari was filed on July 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted of conspiracy to distribute, and to possess with intent to distribute, in excess of five kilograms of cocaine (Count 1); possession of cocaine with intent to distribute it (Counts 2 and 3); and traveling in interstate commerce to carry on an illegal business enterprise (Count 4). He was sentenced to concurrent terms of imprisonment of 360 months for Count 1, 240 months for Count 2, 120 months for Count 3, and 60 months for Count 4, to be followed by ten years of supervised release. C.A. App. 179-181. The court of appeals affirmed.

1. The evidence at trial showed that from 1972 until 1978, petitioner directed a marijuana distribution ring that transported marijuana in 200-pound shipments from Florida to eastern Missouri and southern Illinois. In the early 1970s, George Yager and Richard Yackey transported shipments of marijuana from Florida to St. Louis and returned to Florida with the proceeds of those shipments. Petitioner's brother, Daniel Robinson, managed the distribution of the marijuana in St. Louis, and petitioner was in charge of the entire operation. The organization expanded its activities in the late 1970s, with petitioner sending Yackey to purchase 20,000 pounds of marijuana in Colombia in a single transaction. The marijuana operation ended in 1979 because of financial setbacks, including the loss of a large boat-load of marijuana. Pet. App. 4a-5a; Gov't C.A. Br. 2-3.

In 1978, petitioner was convicted in a Florida county court of four state felony offenses and was sentenced to a term of imprisonment. Before he began serving that sentence, petitioner asked Yackey to help him begin dis-

tributing cocaine, so that petitioner could generate income for his family during his incarceration. In the fall of 1979, Yackey brought Edward Murphy to Florida to purchase cocaine that petitioner had procured. Pet. App. 5a-6a; Gov't C.A. Br. 3.

Some ten months later, Murphy contacted Yackey and indicated an interest in purchasing more cocaine. Yackey, in turn, contacted Daniel Robinson, who instructed Yackey to make the purchase from a Florida supplier named Edward Alvarez. Yackey and Murphy purchased a kilogram of cocaine from Alvarez and transported it from Florida to St. Louis, where it was sold by Murphy, Yackey, and Daniel Robinson. The profits were divided among Murphy, Yackey, Daniel Robinson, and petitioner. Similar transactions were repeated throughout the early 1980s. Pet. App. 6a-7a; Gov't C.A. Br. 3-4.

Petitioner began serving his Florida sentence in June, 1981, and instructed Yackey to pay his share of the cocaine proceeds to Daniel Robinson. In 1984, George Yager resumed the role of courier that he played in the earlier marijuana conspiracy, and began making runs from Florida to St. Louis with cocaine. In all, the organization transported approximately 110 kilograms of cocaine from Florida to St. Louis between 1979 and 1984. Pet. App. 6a-9a; Gov't C.A. Br. 4.

The organization ceased operation for a short time in 1984, when Murphy withdrew. Before the end of that year, however, Daniel Robinson and Yackey decided to resume the operation and borrowed money from Murphy to make their first purchase. Although Daniel and Yackey agreed to split the profits evenly, Daniel later reminded Yackey that petitioner was their partner. Yager again acted as the organization's chief courier and made frequent trips to Florida to get cocaine from Al-

varez for distribution in the St. Louis area. Pet. App. 8a-10a; Gov't C.A. Br. 4-5.

In June 1985, petitioner was released from a Florida penitentiary and moved to St. Louis. Once there, he met with Yackey and demanded a third of all the money made by the organization since the resumption of operations in late 1984. He argued that he was entitled to that share for having established the supply connection with Alvarez in the late 1970s. With Daniel Robinson's agreement, Yackey acceded to petitioner's demand and adjusted the organization's records to reflect that allocation of the profits. Pet. App. 10a; Gov't C.A. Br. 5.

The organization continued shipping cocaine until 1988. On March 14 of that year, Yager was arrested by Drug Enforcement Administration (DEA) agents at a storage facility in Granite City, Illinois, where he had taken five kilograms of cocaine. Yager agreed to cooperate with the authorities, and he arranged a meeting at which he would deliver the cocaine to Yackey, who was returning from Florida a few days later. Yackey was arrested upon his arrival on March 18, and a handwritten drug ledger was seized. Yackey also agreed to cooperate. Pet. App. 12a-13a; Gov't C.A. Br. 7.

On March 31, 1988, Daniel Robinson came to Yackey's office and, communicating only in writing, informed Yackey that he thought there might be a problem and that Yackey should come with him. They proceeded to a lawyer's office in downtown St. Louis, where Daniel determined that Yackey was not wearing an electronic surveillance device. They then returned to Yackey's restaurant, where Yackey gave Daniel $4000 and said that half was for him and half was for petitioner. Pet. App. 13a-14a; Gov't C.A. Br. 8.

Meeting at a park on April 2, 1988, petitioner and Yackey discussed the future of the operation. Petitioner said Alvarez was his connection and that he wanted to exclude his brother, Daniel Robinson, from the operation. On April 12, petitioner again met with Yackey and told him to "come clean." Petitioner said that Yackey should admit if he had been caught. If Yackey had cooperated with the authorities, petitioner told him, "we can say you were forced to cooperate." On April 13, DEA agents seized 15 ounces of cocaine from one of the conspirators. Petitioner was arrested shortly thereafter. Pet. App. 14a-15a; Gov't C.A. Br. 9-10.

2. In a pretrial motion and in a motion for new trial, petitioner objected to the admission of evidence concerning the marijuana conspiracy that preceded his organization's involvement with cocaine, arguing that it was inadmissible evidence of uncharged misconduct under Fed. R. Evid. 404(b). The district court held the evidence admissible, finding that it "was not offered to show the defendants' propensity to commit crimes * * *, but was rather evidence of a common plan and design as well as motive, opportunity, preparation and knowledge." C. A. App. 152-153. Reasoning that the government should be permitted to introduce evidence of similar misconduct to prove the commission of a specific-intent crime, the court observed that the prior marijuana conspiracy "bore a 'singular[ly] strong resemblance to the pattern of the offense[s] charged.'" C.A. App. 154, quoting *United States* v. *Jones*, 438 F.2d 461, 466 (7th Cir. 1971). The court therefore found that the probative value of the evidence outweighed its prejudicial effect (C.A. App. 152) and permitted its introduction. The court gave a limiting instruction regarding the marijuana conspiracy, instructing the jury that the evidence was to be considered

only for the limited purpose of showing intent, preparation, plan, and knowledge. See C.A. App. 153.

3. Following a recommendation set forth in petitioner's presentence investigation report, the district court increased his offense level by four levels because he had acted as an organizer or leader of a criminal activity with five or more participants. See Sentencing Guidelines § 3B1.1. With that adjustment, petitioner's offense level was 40, and his Guidelines sentencing range was 360 months' to life imprisonment. The district court imposed a sentence of 360 months' imprisonment. C.A. App. 180.

4. The court of appeals affirmed. Rejecting petitioner's argument that evidence of his prior marijuana conspiracy should not have been admitted, the court found that petitioner "used the organizational framework developed during the marijuana conspiracy to initiate the cocaine conspiracy" (Pet. App. 32a), and explained that the uncharged conspiracy was relevant for background and to show an intent and plan to resume the earlier operation (Pet. App. 33a-34a).[1] The court also approved the adjustment of petitioner's base offense level to reflect his role as an organizer or leader of a criminal

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[1] The court specifically found that "[t]he probative value of the marijuana distribution conspiracy to show intent, motive, and opportunity is strong because it demonstrated that [petitioner and his brother] utilized essentially the same organization to distribute cocaine." Pet. App. 33a. The court noted that petitioner was the leader of both conspiracies and was assisted by his brother throughout; that both conspiracies involved distribution of illegal narcotics purchased from sources in Florida; that both conspiracies employed the same principal "runners"; and that the cocaine conspiracy commenced shortly after the marijuana conspiracy was terminated. Pet. App. 32a.

activity. The court noted that petitioner had initiated the conspiracy, located a source of cocaine, and retained a leadership role throughout the conspiracy's existence. Pet. App. 43a.

ARGUMENT

1. Petitioner renews his argument (Pet. 10-20) that the district court erred in admitting evidence that he organized a conspiracy to distribute marijuana prior to the cocaine conspiracy for which he was charged in this case.

As this Court explained in *Huddleston* v. *United States*, 485 U.S. 681 (1988), Rule 404(b) of the Federal Rules of Evidence requires exclusion of evidence of prior crimes only "when [it] is offered solely to prove character." 485 U.S. at 687. Hence, the dispositive inquiry when such evidence is offered is simply "whether that evidence is probative of a material issue other than character," *id.* at 686; if so, the evidence is "subject only to general strictures limiting admissibility such as Rules 402 and 403." *Id.* at 688.[2]

When a conspiracy is charged, evidence of a closely related preexisting relationship among the conspirators is relevant and admissible to show motive and intent, to explain the relationship among the conspirators, and to give the jury a complete picture of how the conspiracy

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[2] Petitioner's assertion (Pet. 14-15) that *Huddleston* supports his claim is mistaken. This Court concluded in *Huddleston*, based on a review of the legislative history, that "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence." 485 U.S. at 688-689.

came about.[3] Those issues were clearly in dispute for two reasons. First, petitioner took no action to relieve the government of its burden of proving every element of conspiracy. Second, petitioner's defense at trial was to acknowledge association with the other conspirators, but to suggest that the association was innocent. Petitioner's wife testified that she and petitioner had only a social relationship with Yackey, whose only business-related transaction with petitioner and his wife was to help them select a location for their restaurant and get it started. Gov't C.A. Br. 10. Petitioner's counsel raised the issues of intent and the background of the conspiracy in his closing argument, by emphasizing that the acceptance of money from a conspirator does not, without more, make the recipient a conspirator (C.A. App. 725) and by asserting that petitioner "had nothing to do with" contacts among the other conspirators that initiated their involvement with cocaine (C.A. App. 724). Moreover, important parts of the government's evidence that petitioner participated in the conspiracy, including his insistence on receiving a full share of the proceeds for all of the cocaine transactions because he introduced the other conspirators to their main supplier, would have been difficult for jurors to understand if they had not been informed that the cocaine conspiracy grew out of the earlier conspiracy to distribute marijuana.

Petitioner argues that review is warranted to resolve a conflict among the circuits on whether evidence of un-

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[3] *United States* v. *Jones*, 933 F.2d 1541, 1545-1546 (11th Cir. 1991); *United States* v. *Penson*, 896 F.2d 1087, 1093 (7th Cir. 1990); *United States* v. *Paulino*, 935 F.2d 739, 752 (6th Cir. 1991), cert. denied, 112 S. Ct. 883 (1992); *United States* v. *Harris*, 932 F.2d 1529, 1533-1534 (5th Cir.), cert. denied, 112 S. Ct. 270 (1991).

charged conduct is admissible whenever intent is an element of the charged offense, or only if that element is "actually in dispute." Pet. 11-12. Whatever conflict may exist on that issue, this case is not an appropriate vehicle for its resolution. As explained above, petitioner's organization of the earlier marijuana conspiracy was probative of the nature of his relationship with other conspirators, an issue petitioner's evidence and arguments placed in dispute.[4] Thus, the issue on which petitioner seeks review is not presented by the facts of his case.

2. Petitioner also contends (Pet. 20-35) that the district court erred in adjusting his offense level for purposes of sentencing based on its finding, by a preponderance of the evidence, that he was an organizer or leader of a criminal activity that involved five or more partici-

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[4] None of the cases on which petitioner relies, *United States* v. *Manafzadeh*, 592 F.2d 81 (2d Cir. 1979); *United States* v. *O'Connor*, 580 F.2d 38 (2d Cir. 1978); *United States* v. *Beechum*, 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979); and *United States* v. *Ring*, 513 F.2d 1001 (6th Cir. 1975), involved evidence of an uncharged conspiracy from which the charged conspiracy grew, or a claim by an alleged conspirator that his association with the others was innocent.

Moreover, even "those circuits that follow [the Second Circuit's] approach uniformly require that the defendant affirmatively take intent out of the case, generally by stipulation or concession." *United States* v. *Manner*, 887 F.2d 317, 322 n.2 (D.C. Cir. 1989), cert. denied, 493 U.S. 1062 (1990). Here, petitioner did no such thing. As discussed above, petitioner's defense at trial and his counsel's argument to the jury put intent squarely at issue. Indeed, petitioner acknowledged before trial that "his specific intent to commit the offenses charged [was] a 'matter in issue.'" Mem. in Support of Defendant Paul E. Robinson's Motion in Limine 3-4 (filed May 25, 1989).

pants. Petitioner argues that due process requires that his role as an organizer be proved beyond a reasonable doubt, because it resulted in imposition of a more severe sentence than the Sentencing Guidelines would otherwise have authorized.

This Court rejected a nearly identical claim in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). There, the defendant challenged a statute mandating a minimum five-year sentence if the sentencing judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" (*id.* at 81) during the commission of the offense of conviction. The Court explained that, as a general rule, the reasonable doubt standard applies only to the factual findings necessary to convict the defendant of a crime; because visible possession of a firearm was not an element of the offense for which the defendant was convicted, the State was not required to prove it beyond a reasonable doubt. *Id.* at 84-86. Although a severe minimum sentence was mandatory if the trial court found visible possession, the Court rejected the argument that due process required application of a heightened standard of proof. *Id.* at 91. Noting that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all," the Court found "nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing." *Id.* at 91-92.

As in *McMillan*, nothing in the Sentencing Reform Act of 1984 or the Sentencing Guidelines requires departure from the settled principle that due process permits a sentence to be based on facts established by a preponderance of the evidence. Accordingly, the courts of appeals have held that use of the preponderance standard

for findings under the Guidelines ordinarily satisfies the requirements of due process.[5]

Petitioner attempts to distinguish *McMillan* by asserting that Section 3B1.1 of the Sentencing Guidelines "is derived from [the] statutorily created crime" of conducting a continuing criminal enterprise (Pet. 29), and that by making one of the elements of that crime a basis for sentencing enhancement, the Guidelines evade the requirements of due process through "legislative sleight of hand" (Pet. 31-32). Although this Court cautioned in *Mullaney* v. *Wilbur*, 421 U.S. 684, 699 (1975), that a State would not be permitted to undermine the requirement that crimes be proved beyond a reasonable doubt by redefining their elements as sentencing factors, the Court explained in *McMillan* that that admonition is not implicated simply because a statute calling for an enhanced penalty shares some element in common with a separate statutory offense. Noting that the Pennsylvania statute at issue in *McMillan* "did not change the definition of any existing offense," the Court approved the use of a particular factor in sentencing, even though the

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[5] See *United States* v. *Sklar*, 920 F.2d 107, 110 (1st Cir. 1990); *United States* v. *Guerra*, 888 F.2d 247, 251 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990); *United States* v. *McDowell*, 888 F.2d 285, 290-291 (3d Cir. 1989); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1238 (4th Cir.), cert. denied, 493 U.S. 943 (1989); *United States* v. *Silverman*, 889 F.2d 1531, 1535 (6th Cir. 1989); *United States* v. *White*, 888 F.2d 490, 499 (7th Cir. 1989); *United States* v. *Gooden*, 892 F.2d 725, 727-728 (8th Cir. 1989), cert. denied, 496 U.S. 908 (1990); *United States* v. *Restrepo*, 946 F.2d 654 (9th Cir. 1991), cert. denied, 112 S. Ct. 1564 (1992); *United States* v. *Saucedo*, 950 F.2d 1508 (10th Cir. 1991); *United States* v. *Cross*, 916 F.2d 622, 623 (11th Cir. 1990), cert. denied, 111 S. Ct. 1331 (1991); *United States* v. *Salmon*, 948 F.2d 776, 778-779 (D.C. Cir. 1991).

same factor might, in combination with other elements, constitute a separate crime. 477 U.S. at 89-90.

The same is true of Section 3B1.1. In defining the weight to be accorded the defendant's role as an organizer of criminal activity, Congress did not reduce the proof necessary to establish the offense of conducting a continuing criminal enterprise. The elements of that offense, set forth in 21 U.S.C. 848(c) (the CCE statute), remain the same, and differ substantially from the facts that a court must find to increase a defendant's base offense level under Section 3B1.1. To convict under the CCE statute, the government must prove not only that the defendant supervised others, but also that he committed a "continuing series" of drug violations, and that he obtained substantial income from those activities. Section 3B1.1 is not concerned with continuity of violations or the amount of income derived therefrom; it focuses only on the defendant's role as an organizer or leader. Moreover, while conviction under the CCE statute carries a mandatory minimum sentence of 20 years' imprisonment, application of Section 3B1.1 merely adds 2-4 "offense levels" to the defendant's crime of conviction, which in this case resulted in a sentence less than six years longer than the maximum of the range that otherwise would have been prescribed under the Guidelines. Thus, contrary to petitioner's suggestion, Section 3B1.1 does not create a means for applying a lesser standard to punish the defendant for conducting a continuing criminal enterprise.

Nor does Section 3B1.1 alter the maximum penalty for the crime of conspiring to distribute cocaine, as petitioner asserts (Pet. 33-34). In 21 U.S.C. 841 (1988 & Supp. III 1991) and 846, Congress established life imprisonment as the maximum penalty for petitioner's crime.

Like the Pennsylvania statute in *McMillan*, Section 3B1.1 "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty," 477 U.S. at 87-88; it simply guides the district court in the selection of the appropriate sentence within the range prescribed by statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1992